

Office of Chief Counsel  
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-5116-99  
VJGuiliano

date:

to: District Director, Manhattan  
Attn: Howard Schneiweis, Group Manager, Group 1665

from: District Counsel, Manhattan

subject: [REDACTED] (UIL# 6501.08-10)  
Taxable Years: [REDACTED], [REDACTED] and [REDACTED]

PROPER PARTY TO SIGN FORM 872 AFTER MERGER

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This is in response to your request for assistance as to which corporation is the proper party to execute a Form 872 (Consent to Extend the Time to Assess Tax) for the taxable years [REDACTED], [REDACTED] and [REDACTED], since the taxpayer, a foreign corporation doing business in the United States, was merged with and into another foreign corporation on [REDACTED].

During the above taxable years, [REDACTED] ("[REDACTED]") was a foreign bank doing business in the United States through a branch office here. [REDACTED] was incorporated in [REDACTED] and filed a Form 1120-F (U.S. Income Tax Return of Foreign Corporation) for these years. Being a foreign corporation, [REDACTED] was not part of a consolidated return group.

In [REDACTED], [REDACTED] ("[REDACTED]") acquired [REDACTED] percent of the shares of [REDACTED]. [REDACTED] is also a foreign bank that was incorporated in [REDACTED]. [REDACTED] operated [REDACTED] as a subsidiary

until [REDACTED], when [REDACTED] was merged with and into [REDACTED] with [REDACTED] being the surviving entity. This merger was conducted under and pursuant to the laws of [REDACTED].

Since [REDACTED] was merged into [REDACTED] under [REDACTED] law, we have determined that the merger laws of [REDACTED] should govern who has authority to execute a statute extension on behalf of [REDACTED]. By analogy, the Tax Court has ruled on numerous occasions that who has authority to act on behalf of a corporation in tax matters is determined by state law. Sanderling, Inc. v. Commissioner, 66 T.C. 743, 750 (1976), aff'd, 571 F.2d 174 (3rd Cir. 1978) and Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 853 (1985).

Your office has obtained a written statement dated [REDACTED] regarding the merger, which was executed by both [REDACTED] and [REDACTED], a current Senior Vice President and Assistant Vice President of [REDACTED], respectively. This statement is as follows: "After the merger that created [REDACTED] in [REDACTED], [REDACTED] ceased to exist and [REDACTED] succeeded to all the debts, liabilities and duties of [REDACTED]." In addition, a description of this merger is found in statements attached to both the last [REDACTED] return (tax year ending [REDACTED]) and the first [REDACTED] return (tax year ending December 31, [REDACTED]). The statements to these returns describe the merge as follows: "On [REDACTED], [REDACTED] merged with and into [REDACTED], with [REDACTED] being the surviving corporation, under and pursuant to the laws of [REDACTED]. The transaction qualified as a reorganization under Code Section 368(a)(1)(A)."

Based on the above, we recommended to you that the proper party to execute a Form 872 for the [REDACTED], [REDACTED] and [REDACTED] taxable years of [REDACTED] is an authorized officer of [REDACTED]. In addition, we recommended that this Form 872 should be titled "[REDACTED] (E.I.N. [REDACTED]) as successor in interest to, by way of merger with, [REDACTED] (E.I.N. [REDACTED])."

In addition to its primary liability as the successor corporation, [REDACTED] should also have secondary liability as a transferee of [REDACTED]. See Treas. Reg. § 1.301.6901-1(b). Accordingly, we also recommended to you that you have an authorized officer of [REDACTED] execute a Form 2045 (Transferee Agreement) and a Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Against a Transferee or Fiduciary)

As part of our review of your request for assistance, you provided us with copies of previously executed Form 872s for the taxable years [REDACTED], [REDACTED] and [REDACTED]. Our review of these prior

Form 872s revealed that two of these statute extensions are in the name of [REDACTED] alone and were executed after [REDACTED] was merged out of existence on [REDACTED]. Accordingly, an argument could be made that these two Form 872s are invalid.

If the two Form 872s mentioned above were deemed invalid, then the statutes for [REDACTED]'s [REDACTED] and [REDACTED] taxable years expired in [REDACTED]. In addition, the statute for [REDACTED]'s [REDACTED] taxable year would have expired on [REDACTED], since it filed its return for that year on [REDACTED]. Finally, the one year additional statute under I.R.C. § 6901(c) for transferee liability against [REDACTED] for [REDACTED]'s [REDACTED] and [REDACTED] taxable years would have also expired in [REDACTED] of this year.

Based on the above facts, we advised the International Examiner assigned this case to obtain by [REDACTED] for all three taxable years a new statute extension (Form 872) from [REDACTED] "as successor in interest to, by way of merger with, [REDACTED]", along with an agreement of transferee liability (Form 2045) and a statute extension for transferee liability (Form 977) from [REDACTED]. Your office has been successful in obtaining all three of these forms executed by authorized officers of [REDACTED], prior to [REDACTED].

This advice relates solely to the facts of this case and should not be used or applied to the facts of any other case. Should you have any questions regarding this memorandum, please contact the undersigned at (212) 264-1595 (X222).

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District Counsel

By: \_\_\_\_\_  
VINCENT J. GUILIANO  
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